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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

Nos. 352 & 359

BETTY LEVIN,

Petitioner,

—v.—

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

ALLEGHANY CORPORATION, *et al.*,

Petitioners,

—v.—

MISSISSIPPI RIVER FUEL CORPORATION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT MISSOURI PACIFIC RAILROAD COMPANY IN OPPOSITION

MARK M. HENNELLY
210 North 13th Street
St. Louis, Missouri 63103

DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Respondent Missouri Pacific Railroad Company

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

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QUESTIONS PRESENTED

1. Are the provisions of Section D of Article VII of the Articles of Association of Missouri Pacific Railroad Company, which do not expressly require a stockholder "class vote" on a consolidation, to be read as requiring by implication such a class vote on the consolidation proposed in this case?

2. If so, does Section 351.270 of the Missouri Revised Statutes give effect to a corporation's provision in its articles of incorporation for a class vote on a consolidation, where no provision of Chapter 351 of the Missouri Revised Statutes requires a class vote on such a transaction in the absence of such a provision in the articles?

3. If questions 1 and 2 are answered in the affirmative, do the provisions of Section 5(11) of the Interstate Commerce Act establishing a federal standard of a majority non-class vote to authorize a consolidation between rail carriers subject to that Act "unless a different vote is required under applicable State law, in which case the number so required shall assent," incorporate by reference a state law provision which simply permits a particular vote to be required by the articles of incorporation, or are Section 5(11)'s provisions simply limited to incorporating by reference mandatory provisions of state statutory law?[1]

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[1] Should certiorari be granted, we reserve the right to argue the following additional questions in support of the judgment below:

4. Is Chapter 351 of the Missouri Revised Statutes, as held by the Court of Appeals, "applicable State law" to which the provisions of Section 5(11) of the Interstate Commerce Act make reference in this case, or is Chapter 388 thereof "applicable State law," if indeed there is any "applicable State law"?

5. Can the provisions of Section 5(11) of the Interstate Commerce Act which refer to the "applicable State law" as to the "number . . . required . . . of the votes of the holders of the shares entitled to vote of the capital stock of such corporation" be read in any event as permitting an incorporation by reference of a state law requirement for a class vote, or is the provision limited to incorporating by reference state law requirements for a more-than-majority vote of all the stockholders?

STATUTORY PROVISIONS

This case involves certain provisions of Chapters 351 and 388 of the Missouri Revised Statutes, and Sections 5(2) and 5(11) of the Interstate Commerce Act, 54 Stat. 905, 908 (1940), as amended, 49 U.S.C. §§5(2) and 5(11). Section 5(11) of the Interstate Commerce Act is set out at Levin Pet. 37a-38a and at A-S Pet. 1a-2a; certain provisions of Chapter 351 of the Missouri Revised Statutes are set out at Levin Pet. 39a-41a and at A-S Pet. 2a-4a. Section 5(2) of the Interstate Commerce Act is set out in the Appendix to this Brief, pp. 1a-4a. Further portions of Chapter 351, and the relevant portions of Chapter 388 of the Missouri Revised Statutes are set out in the Appendix to this Brief, pp. 4a-5a, and pp. 5a-14a, respectively.

STATEMENT

The two petitions for certiorari in Nos. 352 and 359 seek this Court's review of a judgment rendered by the Court of Appeals for the Eighth Circuit on an interlocutory appeal to it under Section 1292(b) of the Judicial Code from the District Court for the Eastern District of Missouri. The only question decided by the Court of Appeals on that interlocutory appeal was whether, under the Articles of Association of Missouri Pacific Railroad Company ("Mo Pac"), and under the applicable provisions of Missouri law and the Interstate Commerce Act, separate "class voting" by the Class A and Class B stockholders of MoPac was

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[2] References to the Petition for Certiorari in No. 352, filed by Betty Levin, will be denoted "Levin Pet." and to the Petition in No. 359, filed by Alleghany Corporation, Rose Slayton, *et al.*, as "A-S Pet." References to the record as printed for the use of the Court of Appeals are designated as "R.", and to the supplement to that record as "S."

required at the MoPac stockholders' meeting which was to consider approval of a certain Plan of Consolidation to which MoPac was a party.

The Plan of Consolidation and the ICC Application.— In December 1963, the Boards of Directors of MoPac and of The Texas and Pacific Railway Company ("Texas & Pacific") approved an "Agreement and Plan of Consolidation" which would effect the consolidation of the two railroads. MoPac, a Missouri corporation, is an interstate common carrier by rail having 9079 miles of track in eleven states. Texas & Pacific, a federal corporation incorporated by a special Act of Congress in 1871, 16 Stat. 573, is also an interstate common carrier by rail and has 1765 miles of track in three states. In the proposed consolidation, the consolidated company was to become a Delaware corporation under the charter of The Texas & Missouri Pacific Railroad Company ("T&M"), a new Delaware corporation which had been formed for the purpose of effecting the consolidation.[4] (R. 5, 31, 52)

MoPac currently has two classes of equity securities: Class A stock, of which there are outstanding 1,849,576 shares, and Class B stock, of which there are outstanding 39,731 shares. (R. 26, 45) In the consolidation, each of these shares would become four shares of the $25 par value common stock of the new Delaware corporation, T&M.

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[4] Delaware is the most popular state for incorporation of publicly held corporations. Hornstein, *Corporation Law & Practice* (1959), § 77; Rohrlick, *Organizing Corporate and Other Business Enterprises* (3d ed. 1958), § 6.01, at 218-19. Over one-third of the corporations whose stock is listed on the New York Stock Exchange are Delaware corporations. Corporation Service Company, *1965 Digest of the Delaware Corporation Law*, p. 1. For the advantages of the surviving company in a rail consolidation being incorporated in Delaware, see *New York Central R. Co. Merger*, 312 I.C.C. 417, 420 (1961).

Each publicly held[4] share of the stock of Texas & Pacific would become 4.8 shares of the $25 par value common stock of T&M. (R. 5, 31, 52-53)

In January 1964, MoPac, Texas & Pacific and T&M filed a joint application before the Interstate Commerce Commission ("ICC") for orders under Section 5(2) of the Interstate Commerce Act, 49 U.S.C. §5(2), as required to authorize the proposed consolidation, and under Section 20a of the Act, 49 U.S.C. §20a, to authorize the issuance of securities by T&M that would be incident to the consolidation. (R. 54) In that application, which is currently pending before the ICC, MoPac stated that it intended to submit the Plan to its stockholders for their approval, as contemplated by Section 5(11) of the Act, by May 1964.[5] MoPac has announced that it does not propose to hold a class vote of the stockholders on the consolidation, but that the Class A and Class B stockholders would vote together on the consolidation without regard to class.

The Proceedings in the District Court.—Shortly after the announcement of the proposed consolidation, three lengthy complaints were filed in the District Court by the present petitioners, various holders of shares of Class B stock of MoPac,[6] naming as defendants MoPac and various

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[4] Of Texas & Pacific's 445,464 shares of stock, 76,353 are held by the public. The remainder are held by MoPac. (R. 25) The shares in Texas & Pacific held by MoPac would, upon the effective date of the consolidation, be likewise each changed into 4.8 shares of T&M common stock, but these shares would be held as T&M treasury shares. (S. 3-4)

[5] There have not been any active proceedings before the ICC, and the MoPac stockholders' vote has not been held, pending the instant lawsuits.

[6] The first of these three lawsuits was brought by one Rose Slayton, the owner of ten shares of Class B stock. (R. 1-15) In the

other corporations and individuals, generally including Mississippi River Fuel Corporation, the holder of a majority of MoPac's Class A stock, and various officers and directors of MoPac. (R. 1-15; 23-37; 44-66) These three complaints made, either incident to an alleged class action on behalf of MoPac's Class B stockholders or to an alleged derivative suit on behalf of MoPac, or both (R. 2, 24-25, 45, 62), various charges of wrongdoing and fraud on the part of the defendants in connection with the proposed Plan of Consolidation and otherwise. Common to all three complaints, however, was the charge that the proposal of Mo Pac to submit the Plan of Consolidation to its stockholders to be voted on by a general, rather than a class vote, was contrary to law. (R. 8, 10; 34-35, 36; 53-54, 64)

MoPac filed in each of the three cases a motion to dismiss, on the grounds, generally, (i) that the principal charges of the complaints—relating to the alleged unfairness of or fraud in the Plan of Consolidation—concerned matters which were reserved exclusively to the ICC for determination, and as to which the District Court had no jurisdiction; and (ii) that with respect to the charges that a class vote of MoPac's stockholders was required—(which charges MoPac did not allege were beyond the jurisdiction of the District Court)—the complaints demonstrated on their face that the plaintiffs were not entitled to relief. (R. 17-18; 37-39; 66-70)

Slayton action, certain other plaintiffs, Joseph M. Proskauer, Walter Mendelsohn, Alfred L. Rose and Dorothy B. Rose, who apparently are connected with a prominent New York law firm, and who own an aggregate of 250 shares, were permitted to intervene. (R. 15-16) The next suit was commenced by Alleghany Corporation and its voting trustee, Empire Trust Company, the holder of a majority of the Class B stock. (R. 23-37) The plaintiffs in these first two suits are currently the petitioners in No. 359. The third suit was brought by one Betty Levin, the owner of 85 shares of Class B stock. (R. 44-66) She is currently the petitioner in No. 352.

The District Court ordered a limited consolidation of the three cases and, by agreement of the parties, that portion of MoPac's motion to dismiss which related to the charge that class voting was required was severed for hearing, in advance of the other issues, by the District Court. (R. 72, 77-79) After hearing arguments solely addressed to the question of the necessity for class voting, the District Court ruled on July 13, 1964, that class voting by MoPac's stockholders was required. (R. 90-100) It thereafter amended its order to make the certification specified by Section 1292(b) of the Judicial Code with respect to interlocutory appeals. (R. 102-03) On October 14, 1964, the Court of Appeals permitted an interlocutory appeal to it from the District Court's order which overruled the motion to dismiss insofar as it was addressed to those portions of the complaint charging that the failure to provide for class voting by MoPac's stockholders was unlawful. (R. 103-04)

The Decision of the Court of Appeals.—On April 19, 1966, the Court of Appeals unanimously reversed the order of the District Court on the limited questions which were before it.

The Court of Appeals observed that, in order to make out a case for the requirement of class voting, the plaintiffs were required to demonstrate (a) that MoPac's Articles of Association, the pertinent provisions of which are set out in the margin,[7] required a class vote on a consolidation;

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[7] Article VII, Section D:

"(3) The Company shall not, without the consent, given in writing or by resolution adopted at a meeting duly called for that purpose, of the holders of record of at least a majority of the number of shares of the Class A Stock then outstanding and at least a majority of the number of shares of the Class B Stock then outstanding, (a) issue any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of

(b) that, if so, the relevant provisions of Missouri law give effect to this provision; and (c), that if (a) and (b) were demonstrated, the provisions of Section 5(11) of the Interstate Commerce Act, which is the governing statute as to the vote required to approve a railroad consolidation, in turn incorporated by reference the Missouri law's incorporation by reference of the Articles of Association.

The Court of Appeals held that in order to establish the illegality of the proposal to conduct the voting on a general, rather than a class, basis, the plaintiffs had to make good all three points. It held that they had in fact made good none of them.[8] The Court of Appeals held that the plaintiffs had

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Section C of this Article VII, (b) create or issue any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class, (c) alter or change the preferences, qualifications, limitations, restrictions and special or relative rights of the Class A Stock or of the Class B Stock or (d) amend or eliminate any of the provisions of this paragraph (3).

"(4) Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company, including any amendment to the Articles of Association. . . . " (R. 13-14)

[8] The opinion of the Court of Appeals summarized its holdings as follows: "But, while there are significant contrary arguments, we are not persuaded either (a) that MoPac's Articles call for a class vote on a consolidation, or (b) that, if they do, § 351.270, by its reference to the articles, demands a class vote, or (c) that, even if it does, class voting is something 'required under applicable State law'. In our view, the Class B shareholders must surmount each and all of these hurdles in order to prevail. We are not convinced that they have surmounted any of them." (Levin Pet. 34a; 359 F.2d, at 119)

The petitioners make much of the fact that the Court of Appeals, particularly as to the questions of interpretation of the MoPac Articles and the relevant Missouri law, frankly expressed certain doubts and recognized that the questions were somewhat

not shown that MoPac's Articles of Association, which in their provisions for a class vote do not expressly refer to mergers or consolidations at all, should be interpreted as requiring a class vote upon a consolidation. It further held that, while contrary to MoPac's contentions, the applicable Missouri law relative to the consolidation, to which Section 5(11) of the Interstate Commerce Act makes reference, is not Chapter 388 of the Missouri Statutes, but Chapter 351, as contended by petitioners,[9] in any event Chapter 351 did not give effect to any provision of corporate articles of association or incorporation purporting to impose a class vote requirement upon a consolidation, even if MoPac's Articles had so purported. It further held that

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difficult. That a Court of Appeals is frank enough in its opinion to observe that there are contrary arguments to some of its conclusions hardly creates a situation indicating review by this Court. The questions which the Court of Appeals decided, however close it may have thought them, nonetheless are predominantly questions as to the interpretation of the charter of a single Missouri corporation and of the Missouri Statutes, questions which hardly warrant this Court's review, as we develop below at pp. 15-19, 20-21.

[9] MoPac and the other respondents contended below that Chapter 351 did not apply at all to a railroad consolidation, but that the relevant provision of Missouri law was Chapter 388, which sets forth a statutory procedure for the merger of railroad corporations, in which only a majority vote, rather than the two-thirds vote required under Chapter 351, is required, and which contains no counterpart provision to §351.270, on which the petitioners base their argument that a class vote was permissible under Missouri law if the Articles so required. As indicated under "Questions Presented" (p. 2 n. 1, *supra*), if certiorari is granted, we reserve the right to argue that the Court of Appeals was mistaken in its conclusion that Chapter 351 was governing.

The petitioners claim there is some doubt as to whether the Court of Appeals in fact held that Chapter 351 is the relevant state law. (Levin Pet. 26) We see no basis for such doubt in view of the Court's clear language (Levin Pet. 32a; 359 F.2d, at 117, 119), and MoPac proposes to conduct the stockholder vote on the basis that a two-thirds vote is required by reason of the reference of Section 5(11) to this mandatory provision of Missouri law, under compulsion of the Court of Appeals' holding. See, however, p. 2 n. 1, Question 4, *supra*, and p. 17 n. 18, *infra*.

even if Missouri law had adopted the putative requirement in the Articles of Association for class voting, the limited incorporation of state law requirements made by the governing federal statute, Section 5(11) of the Interstate Commerce Act, only incorporated state-law voting requirements which are set forth as such in the state statutes, and not the requirements of private articles of incorporation or association to which state law might give effect on a "permissive" or "enabling act" basis.—In the light of these holdings, the Court of Appeals did not pass on the further question whether, in any event, Section 5(11) of the Interstate Commerce Act would even incorporate by reference an *express requirement* in state law for a class vote, or whether its scope was limited to the incorporation by reference of state-law requirements of general votes of more than the majority of the stock which is specified as the ordinary requirement for stockholder approval by Section 5(11).[10]

The Court of Appeals, accordingly, reversed the order of the District Court and remanded the case for further proceedings on the other issues left unresolved.

ARGUMENT

1. The unanimous decision of the Court of Appeals on the three-way interplay between the Articles of Association of MoPac, the complex provisions of Missouri law, and the federal standard established in Section 5(11) of the Interstate Commerce Act is clearly correct and a review by this Court of the incidents of this unique combination would scarcely serve any useful general purpose.

The points of inquiry are the provisions of MoPac's Articles, of Missouri law, and of the pertinent paragraphs

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[10] See p. 2 n. 1, Question 5, *supra*.

of Section 5 of the Interstate Commerce Act relating to voluntary rail mergers, which were enacted by Congress in the 1940 Transportation Act in an effort to facilitate voluntary mergers of rail carriers. See *Schwabacher* v. *United States,* 334 U.S. 182, 193-94 (1948); *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 84-85 (1944); *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173, 185 (1959). Section 5(2) of the Interstate Commerce Act affirmatively declares that:

> "It shall be lawful, with the approval and authorization of the Commission . . . for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation . . . ."

That section also describes the requirement that the Commission, upon application to it for its approval must find before it grants its approval that the proposed consolidation is "just and reasonable" and that it is "consistent with the public interest."

Section 5(11) makes plain the relationship between federal and state law in a railroad merger or consolidation. That section declares that: "The authority conferred by this section shall be exclusive and plenary," and that carriers participating in such a merger or consolidation approved by the Commission are to have "full power . . . to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under state authority. . . ." Moreover, those carriers are declared to be "relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . . ."

The only reference to state law in Section 5(11), except by way of negating its application, occurs in the section's requirement that, in the case of certain described transactions, including a corporate consolidation, the carriers obtain:

> "the assent . . . of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose.[11] . . ."

This Court, in *Schwabacher* v. *United States, supra,* at 194, after reviewing the history of Congress' attempts to simplify rail consolidations, concisely summarized the requirements as follows:

> "So reading the legislation relevant to this merger, we find that approval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it 'will be consistent with the public interest.' (§ 5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is 'just and reasonable.' (§ 5(2)(b).) Third, assent of a

[11] It is interesting to observe that the federal law here is so pervasive as to provide for the sort of meeting at which the question may be voted on, and for the question whether special notice of the proposed action must be included if it is brought before a regular meeting—questions which, in the ordinary case, are regulated entirely by state corporation law provisions. See, *e.g.,* Calif. Corp. Code §§ 2201(b), 4107; Del. Code Ann. tit. 8, § 251(c); Ill. Rev. Stat. c. 32, § 157.63; Nev. Rev. Stat. § 78.470; N.Y. Bus. Corp. Law § 903; Texas Bus. Corp. Act art. 5.03(A).

'majority, unless a different vote is required under applicable state law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote.' (§ 5(11).) When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority. . . ."

Indeed, in *Schwabacher,* the Court held that there was no room in this federally oriented system for the survival of state-law-created rights of dissent and appraisal, of a nature which are common in state corporation laws,[12] and which are intimately tied up with the subject of voting requirements and class vote questions.[13]

But questions as to the relative scope of federal and state law here are hardly necessary to decision. Here it was necessary for the petitioners to have demonstrated in the Court of Appeals—or, to demonstrate in this Court, if the Court of Appeals' judgment is to be reversed—*each* of four successive propositions:

(1) That the Articles of Association of MoPac, in the first place, purport to require class voting on a consolidation—although the provisions of the Articles of Association which refer to class voting do not even mention merger or consolidation and contain a clause expressly negating the availability of a class vote in any other circumstances than the ones specified in the Articles.

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[12] See, *e.g.,* Calif. Corp. Code § 4123; Del. Code Ann. tit. 8, § 262; Ill. Rev. Stat. c. 32, §§ 157.70, 157.73; Mo. Rev. Stat. §§ 351.405, 351.455; Nev. Rev. Stat. § 78.505; N.Y. Bus. Corp. Law § 910; Texas Bus. Corp. Act art. 5.11(2).

[13] See Gibson, *How Fixed Are Class Shareholder Rights?,* 23 Law & C. Probs. 283, 292 (1958); Lattin, *Minority and Dissenting Shareholders' Rights in Fundamental Changes,* 23 Law & C. Probs. 307 (1958); Note, 72 Harv. L. Rev. 1132 (1959).

(2) That, if the Articles do make such a requirement, the applicable Missouri law, which plainly does not *require* class voting on a consolidation, nonetheless in fact permits class voting to be voluntarily imposed through charter provisions in the case of a consolidation.

(3) That Section 5(11) of the Interstate Commerce Act ordains an incorporation by reference of state law where the state law, instead of expressing a state law *requirement*, simply sets up a "permissive" or an "enabling act" provision permitting a corporation to provide for a particular voluntary vote in its charter.

(4) That, if so, Section 5(11) is designed to incorporate by reference not only state law requirements for a greater-than-majority vote,[14]—on which its language taken in the natural sense reads—but that it also incorporates state law requirements (including "requirements" by way of charter provisions) for class votes—that is to say, votes not on the basis of the number of "the holders of the shares entitled to vote of the capital stock of such corporation," as specified in the Interstate Commerce Act, but on the basis of separate classes thereof.[15]

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[14] As the Court of Appeals indeed applied it here, by holding that a two-thirds vote of the stockholders generally was required, in light of the provisions of §351.425 of the Missouri Revised Statutes.

[15] The theory of §§5(2) and 5(11) of the Interstate Commerce Act would, besides §5(11)'s language, support a conclusion that §5(11) does not incorporate even express state law requirements of a class vote. These requirements are inserted into state general corporation laws as a measure of protection against unfairness between classes of stockholders. In the ordinary merger governed by state law there is no regulatory review of the "justness and reasonableness" of the terms. Under §5(2) of the Interstate Commerce Act there is such an examination by the ICC, which is a factor removing the need for the mechanism of a class vote.—As indicated herein, the Court of Appeals was not required to reach this point; indeed any of the three other points on which it based its judgment is sufficient to support it.

The Court of Appeals held adversely to petitioners on issues (1), (2) and (3), and, accordingly, never had to reach issue number (4). Its holding on each point is clearly correct and sufficient to support its judgment; and only if its holding on each ground were incorrect—and then only if issue number (4) were also determined adversely to respondents' contentions—could the judgment of the Court of Appeals be reversed.

(1) In the first place, the Court of Appeals was correct in holding, as a matter of its interpretation of the MoPac Articles—essentially a question of state law—that those Articles do not require a class vote on a merger or consolidation. Certainly the Articles do not expressly require such a class vote; and no serious argument can even be made that they do by implication where the surviving corporation in the consolidation is not the MoPac. The Articles provide for a class vote only (a) where there is to be authorized the "issue[of] shares of stock of the Company [*i.e.*, MoPac, the Missouri corporation] of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII"; (b) where there is to be authorized the "creat[ion] or issue [of] any obligation or security of the Company convertible into or exchangeable for shares of stock of the Company of any class"; (c) where there is to be authorized the "alter[ation] or change [of] the preferences, qualifications, restrictions and special or relative rights of the Class A Stock or of the Class B Stock"; or (d) where it is proposed to "amend or eliminate any of the provisions of this paragraph (3)." In all other cases, paragraph (4) of Article VII expressly negates class voting: "Except as otherwise provided above in paragraph (3) of this Article VII, or as otherwise required by law, each share of Class A Stock and

each share of Class B Stock shall have the same voting power, and the vote of the holders of all or any portion of any class of stock, as a class, shall not be required for any other action whatsoever to be taken or authorized by the stockholders of the Company. . . . " (R. 13-14)

The Articles do not provide for class voting in the case of a merger or consolidation; they do not speak of merger or consolidation at all, although these are certainly not unusual corporate happenings.[16] Nor do they even go so far as to require a class vote upon a merger or consolidation which contains provisions such as, if effected through an amendment to the articles of incorporation, would require a class vote, although again precedent for this approach in draftsmanship is not lacking.[17] Finally, it could not even be said that by implication a merger or consolidation amounts to an issuance of new stock "of the Company," referred to in clause (a), or an alteration of the special or relative rights of the Class A or Class B Stock of the Company, or an amendment or elimination of any of the provisions of paragraph (3), as referred to in clause (c) or (d), inasmuch as the consolidation contemplates not the reshuffling of rights in MoPac but the creation of an entirely new corporation, the Delaware corporation, T&M, which will succeed to all of the properties of MoPac and of Texas & Pacific.

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[16] Indeed, the draftsman of the Missouri Pacific's Articles provided for these contingencies in other places. In the last sentence of paragraph (2) of § D of Article VII, which immediately precedes paragraph (3) which describes the events giving rise to class voting, the draftsman specifically takes merger and consolidation into account: "Neither the merger nor consolidation of the Company into or with any other corporation, nor the merger nor consolidation of any other corporation into or with the Company, nor a sale, transfer or lease of all or any part of the assets of the Company, shall be deemed to be a liquidation, dissolution or winding up of the Company." (R. 13)

[17] See p. 17 n. 19, *infra*.

(2) Even if the holding of the Court of Appeals as to the meaning of the MoPac's Articles of Association were not correct, its decision is supportable on another point of state law it decided. For if it is to be assumed that the Court of Appeals was correct in holding, contrary to our contentions below,[18] that Chapter 351 of the Missouri Revised Statutes was applicable, that chapter does not lend validity to provisions in a corporate charter purporting to require a class vote in the case of mergers and consolidations. While this point is one of state law, which ordinarily this Court will not review in any event, the Court of Appeals' holding on it is quite correct. As the Court of Appeals held, Section 351.425, which relates to consolidations and mergers, provides that the plan of consolidation "shall be approved upon receiving the affirmative vote of the holders of at least two-thirds of the outstanding shares entitled to vote at such meeting, of each of such corporations." Unlike the law in a number of states, Missouri law does not require a class vote on consolidations.[19]

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[18] There are further bases on which it should be concluded that Chapter 351 is not "applicable state law," apart from the applicability of Chapter 388 (see p. 9 n. 9, *supra*): (i) Whether or not Chapter 388 applies, the provisions of Chapter 351 relied on by petitioners are not applicable to railroad companies; see § 351.020 and the limited cross-reference provisions of § 351.690(3) (Appendix, p. 4a). (ii) In any event, it does not appear that the provisions of § 351.458, permitting Missouri corporations to merge or consolidate with "foreign" corporations, contemplates mergers or consolidations where the other corporate parties are incorporated other than under the laws of a state. Texas & Pacific is a federal corporation.—If neither Chapter 351 nor Chapter 388 applies, as petitioner Levin appears to admit (Levin Pet. 27 n. 29) there would be no reference to state law at all and the majority vote standard of §5(11) would prevail.

[19] A number of state statutes require a class vote on all mergers and consolidations. See Hawaii Rev. Laws § 173-4; Mass. Gen. Laws Ann. c. 156 § 46(B); Mich. Stat. Ann. § 21.52; Nev. Rev. Stat. § 78.470. *(continued on next page)*

To be sure, as the Court of Appeals recognized, Chapter 351 also contains the "enabling act" provisions of Section 351.270, which reads:

> "Whenever with respect to any action to be taken by the stockholders of a corporation the articles of incorporation require the vote or concurrence of the holders of a greater portion of the shares, or of any class or series thereof, than required by this chapter with respect to such action, the provisions of the articles of incorporation shall control this section."

But the trouble with this for the petitioners is that, unlike other portions of Chapter 351,[20] the provisions for a merger or consolidation in Section 351.425 do not require a class vote in the first place; and, accordingly, the provisions requiring a greater portion of the class to concur "than required by this chapter with respect to such action" do not have any referent, and the section is consequently inapplicable. In short, Section 351.270 permits the articles to require the vote of a greater proportion of a class than is

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An example of another approach is Article 5.03B of the Texas Business Corporation Act, based on the Model Corporation Act, which provides that: "Any class of shares of any such corporation shall be entitled to vote as a class if the plan of merger or consolidation, as the case may be, contains any provision which, if contained in a proposed amendment to articles of incorporation, would entitle such class of shares to vote as a class." The Texas provisions as to class voting on amendments to the articles of incorporation are detailed and specific. Texas Bus. Corp. Act art. 4.03.

Illinois Rev. Stat. c. 32, § 157.64, is quite similar to Texas Article 5.03B. The Illinois corporation laws and the Missouri corporation laws have a common history (see 17 Vernon's Annotated Missouri Statutes, p. 299), and the failure of the Missouri statutes to make a similar provision accordingly is of significance.

[20] Thus, the provisions of Mo. Rev. Stat. §351.090 do, for example, in certain specified cases, require class voting upon the adoption of amendments to the articles of incorporation.

required under the statute in those cases where the statute requires a class vote in the first place; they do not purport to permit a discrimination to be made among stockholders by the articles by enabling class voting to be injected into situations where the statute does not provide for it.[21]

(3) Finally—although it did not need to reach the point—the Court of Appeals correctly determined that in any event Section 5(11) defers only to those requirements of more than a majority vote which are contained in terms as *requirements* in state law, not to those which are contained in individual corporate charters and which are permitted to be effective by a state law in the nature of an enabling act. (Levin Pet. 34a; 359 F.2d, at 119). The basic point of Section 5(11) is to make an allocation between federal and state power. Section 5(11), in fulfillment of the Section's clear purpose of simplifying the otherwise complex requirements that would be imposed under state law upon a consolidation of rail carriers, imposes a single federal standard of a majority vote, subject only to an exception for votes "required" under applicable state law. As the Court of Appeals correctly pointed out (Levin Pet. 34a;

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[21] An example of such an express enabling act for a voluntary class vote on a merger is Ohio Rev. Code Ann. § 1701.79(B):

> "In order to be adopted, the agreement [of merger] . . . must receive the affirmative vote of the holders of shares of such constituent corporation entitling them to exercise two-thirds of the voting power of such constituent corporation on such proposal or, if the articles provide or permit, the affirmative vote of a greater or lesser proportion, but not less than a majority, of such voting power, *and such affirmative vote of the holders of shares of any particular class as is required by the articles of such constituent corporation.*" (emphasis supplied)

See also Vt. Stat. Ann. tit. 11, § 162.

Other state statutes contain general provisions serving as enabling acts, in the case of stockholder votes generally, for the imposition of voluntary class vote requirements by the articles. See Conn. Gen. Stat. Rev. § 33-329(a) (final sentence). *Cf.* also Okla. Stat. tit. 18, § 1.166a(3); Pa. Stat. Ann. tit. 15, § 2852-902(C).

359 F.2d, at 119), there is a distinction in language between a vote which is "required" and that which is "permitted"; and it will not do to say that because state law permits a class vote it accordingly becomes "required" if provided for.

Moreover, in terms of the policy of the federal statute, the distinction drawn by the Court of Appeals also holds good; it is one thing for federal law to make deference to that which the state legislature has seen fit to require generally of its corporations; it is quite another to say that the federal law was designed to incorporate by reference, where the state law permitted it, the individual charters of railway corporations,[22] often antique and outmoded, and to force protracted judicial inquiries—of the sort which petitioners are essaying here—into their meaning.

* * * * *

The decision is thus amply supportable on any and all of the grounds on which it stands; and the far-reaching consequences claimed for it by petitioners are patently visionary. (A-S Pet. 12-14; Levin Pet. 27-28) In point of fact, the decision relates only to a combination of factors peculiar to one carrier, the MoPac.—The Court of Appeals did not undertake to rule on the question of what the con-

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[22] Often, railroad corporations may not be incorporated under a state's general corporation law, and they are instead incorporated under other provisions of the state's code. See, *e.g.*, Conn. Gen. Stat. Rev. § 33-286; Ill. Rev. Stat. c. 32, § 157.3; Mo. Rev. Stat. § 351.020; Mich. Comp. Laws § 450.3; Texas Bus. Corp. Act art. 2.01(4)(e) (general statutes not available); Ill. Rev. Stat. c. 114, § 1; Mich. Stat. Ann. § 22.201; Mo. Rev. Stat. § 388.020; N.Y. Railroad Law § 5; Texas Rev. Civil Stat. art. 6259 (special provisions). Many railroad corporations have special charters granted, often at a now remote date, under special legislation. Elliott, *Railroads* (3d ed. 1921), § 22, p. 39; 1 Fletcher, *Cyclopedia of Corporations* (1963), § 148. Their charters do not reflect the uniformity that characterizes those which are presently mass produced under the laws of the popular incorporation states.

sequences would be if it were confronted with a state law expressly requiring class voting on a rail consolidation.[23] Indeed, in view of the fact that the court held that the petitioners had not demonstrated either that the MoPac's Articles required class voting or that the relevant provisions of Missouri law provided an "enabling act" for such a charter requirement, even if one were assumed to exist, even the question of the relationship between Section 5(11) and state statutes purporting to enable railroads to provide for class voting on consolidations in their charters is not tendered to this Court.—To be sure, even if it were tendered, there are, by the petitioners' own count, only five railroads listed on the New York Stock Exchange whose charters provide for class voting on a merger or a consolidation (A-S Pet. 49a); the statutes of their respective states of incorporation have not been called to the attention of the Court; and there is no real way of knowing whether the question will ever become important even to these five railroads.[24]—No significance of this case other than to the litigants is demonstrated; this Court's discretionary powers should not be exercised to review the complex and unique interrelationship between the charter of a single corporation, the laws of Missouri, and the Interstate Commerce Act which this case presents.[25]

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[23] For example, a statute of the sort referred to in n. 19, p. 17, *supra*. The problems raised by such a statute in a § 5(11) context may, we suggest, be faced when and if they arise.

[24] It will become important to them only if they are involved in a merger or consolidation subject to ICC approval under § 5(2) and there were some peculiar difficulty—such as the existence of a hostile holder of the majority of a relatively small class of their stock—which would make the consolidation difficult if class voting were required but not so in a general vote.

[25] The Alleghany-Slayton petition suggests that the Court of Appeals thought that its decision as to the class vote question would be open to reexamination in the ICC proceedings and on judicial review of them; this is presumably meant to suggest that this

2. In an effort to invest the questions presented in this case with some resemblance to the sort of issues generally passed on by this Court, the petitioners allege that the Court of Appeals neglected what they describe as the "uniform administrative practice" of the ICC in connection with stockholder approval. (A-S Pet. 14; Levin Pet. 22-25) The principal reliance of petitioners appears to be on Section 52.3 of the ICC's Regulations, 49 C.F.R. §52.3. (A-S Pet. 20; 5a-7a)—A reading of the regulation is sufficient to establish the lack of substance to the petitioners' argument. The regulation simply lists the exhibits which must be filed with ICC applications of the sort here involved; it is completely unenlightening as to whether the ICC requires class voting in any case and in fact never mentions the matter of class voting. We submit that it is impossible to draw any inference from the regulation as to what the ICC's views are on a question like the present one.[26]

The fact of the matter is that the ICC has never expressed itself through a holding on any of the substantive questions involved in this case. Recitations in ICC reports of the fact that a class vote may have been taken in a par-

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erroneous impression may have led it into a lax and negligent decision on the class voting question. (A-S Pet. 16) While we certainly agree with petitioners that the decision of the Court of Appeals on this question of law will be *res judicata* (A-S Pet. 16-17), we hasten to add that the Court of Appeals was under no illusion that its decision on the class voting question was subject to further revision in the ICC proceedings or on review of them. The cited passage in its opinion (Levin Pet. 35a; 359 F.2d, at 119) simply reveals the Court of Appeals' accurate understanding that the fairness of the transaction is for determination by the ICC. See pp. 25-27, *infra*.

[26] We can put to one side the question of just how relevant the ICC's views are on this particular subject. The issue is a pure question of interpretation of the corporate charter, state law and §5(11), as all the parties to this action have recognized, and is properly determinable by a court, without reference to the ICC.

ticular case, where there was no issue as to the matter, hardly constitute an expression of administrative views.[27] Even less does the circumstance, cited by petitioners, that class votes have in fact been taken in certain railroad mergers offer any real light on the subject. (A-S Pet. 21-22) Corporate lawyers are necessarily conservative, and act out of an abundance of caution;[28] if a railroad corporation's articles purport to require a class vote on a merger or consolidation without excepting those subject to Section 5(11), and there is no difficulty in obtaining such a favorable vote, any corporate lawyer would advise his client to proceed to obtain it, rather than risk the possibility of being subjected to vexatious litigation.[29]—Of course, this whole line

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[27] Of the cases cited in the Alleghany-Slayton Petition, p. 19, as showing a consistent ICC requirement of a class vote: *Gulf M.&O.R.R. Purchase*, 275 I.C.C. 197, 200 (1940), contains nothing at all about class voting or of any real relevance to the case at bar; *Norfolk & W.Ry. Merger*, 307 I.C.C. 401, 415 (1959), contains a recital *obiter dictum* that Virginia law, which imposed a mandatory (not a permissive) class vote, was controlling, but the effect of § 5(11) does not appear to have been considered, and the point was not in issue; and *Missouri Pac.R.Co. Control of Chi.&E.Ill. R.Co.*, I.C.C. Fin. Dkt. No. 21,755, Hearing Examiner's Report, pp. 128-29 (1963), which involved the question whether control over a single class of stock of the Chicago & Eastern Illinois Railway constituted control over that railway, simply contains a recital that the class of stock in question was entitled to a class vote on certain specified transactions, including "mergers" generally, there being no specific discussion of mergers and consolidations with other rail carriers subject to § 5 of the Interstate Commerce Act or of the effect of § 5(11).

[28] *Cf.* Smigel, *The Wall Street Lawyer* (1964), c. 11.

[29] Indeed, it appears that in certain of the instances in which a class vote was in fact taken which are cited by petitioners (A-S Pet. 21-22) the votes were taken after the institution of the present suits, an event which would certainly intensify the conservatism with which a corporate lawyer would approach the matter. In *Chicago & N.W.—Chicago Great W.*, I.C.C. Fin. Dkt. No. 23,388, the Board of Directors did not act until September 1964, and the stockholders thereafter; in *Chicago & N.W.—Chicago Milwaukee & St. P.*, I.C.C. Fin. Dkt. No. 24,182, the vote occurred in May 1965.

of petitioners' argument neglects the fact that the Court of Appeals held that it had not been shown that the Mo Pac's Articles of Association required a class vote on a consolidation in the first place, or, if they did, that the Missouri statutes would give effect to such a provision.

3. Finally, the petitions stress at considerable length the claimed unfairness of the consolidation. The Levin petition, indeed, apparently proceeds to make the argument that the consolidation is so unfair that it is not a consolidation at all and that the courts should so declare without benefit of any hearing by the ICC on the matter. (Levin Pet. 15-21)[30]

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[30] Another argument urged solely by the Levin Petition is that due to a statement which MoPac made in a pleading filed with the ICC in another matter in 1961 it is now precluded from urging that a class vote is not required on the present consolidation. (Levin Pet. 29-34) The statement, which the Levin Petition does not quote, reads as follows:

> "By virtue of the terms and provisions of the Missouri Pacific Railroad Company's Articles of Association the holders of a majority of said Class B stock are given an effective veto power over many vital and important corporate actions including such things as mergers, recapitalizations, stock dividends, stock options, stock rights, equity financing, the issuance of convertible securities, and the use of Missouri Pacific stock for exchange in acquisitions of control." (R. 82-83)

This catalog of corporate actions to which a class vote extended was not submitted in a case in which the issue of the voting rights of the Class A and Class B stockholders was to be directly determined, but in opposition to an attempt by Alleghany Corporation to terminate the voting trust to which its MoPac Class B shares were subject; MoPac opposed that attempt.

Undeniably, there are class voting provisions in MoPac's Articles, and the question is to which transactions they apply. Petitioner Levin would freight the quoted material's reference to "mergers" with significance for the present case, in the process misstating it as if it were a reference to "mergers and consolidations." (Levin Pet. 31) But the position that MoPac then took is not inconsistent with its position in the present case, for there could well be *certain "mergers,"* as opposed to "consolidations," where a class vote might be required. A specific example would be

As the Court of Appeals correctly recognized, the issue of the fairness of the proposed consolidation is not now presented. Indeed, only the class voting issue was the subject of the interlocutory appeal to the Court of Appeals; and, of course, on remand of the case from the Court of Appeals, there will be ripe for decision that portion of MoPac's motion to dismiss which urges that matters as to the fairness of the consolidation proposal are to be determined by the ICC under Section 5(2)'s "just and reasonable" standard, and that a District Court is precluded from entertaining an independent action on the basis of alleged unfairness or fraud prior to the ICC's determination of the matter.—Thus, the short of the matter is that the questions of fairness were not before the Court of Appeals in any

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a merger with a noncarrier in which MoPac would be the surviving corporation. Such a merger would probably require the issuance of additional shares of MoPac's own stock, and accordingly might require a class vote under the provisions of MoPac's Articles which requires a class vote by MoPac before the issuance of "any shares of stock of the Company of any class now or hereafter authorized in addition to the shares authorized to be issued by the provisions of Section C of this Article VII." See pp. 7-8 n. 7; p. 23 n. 27, *supra*. If such a merger were with a noncarrier, §5 of the Interstate Commerce Act would not be relevant and the only referent would be state law. This is scarcely an admission that there is class voting in a rail consolidation where MoPac is not the surviving corporation and where proceedings under §5(2), which will give rise to the application of §5(11), are required.

The Levin Petition does not demonstrate how, in any event, the present petitioners relied upon the specific position taken by MoPac in 1961, which reliance is a required element of a so-called "equitable estoppel" (see, *e.g.*, *Pitcairn* v. *American Refrigerator Transit Co.*, 101 F.2d 929, 935 (8th Cir. 1939), *cert. denied*, 308 U.S. 566 (1939)), nor does it suggest how this statement of MoPac, even if it were relevant to the present problem, could operate to divest the Class A stockholders of MoPac of their rights not to have the Class B stockholders vote separately from them, except where the law so requires. The Court of Appeals correctly held that this statement did not estop MoPac (Levin Pet. 35a; 359 F.2d, at 119) and the point scarcely warrants further review. Finally, for a statement on the part of petitioner Alleghany totally inconsistent with its present position on class voting, see R. 81.

event; moreover, they are reserved to the ICC in passing on the Section 5(2) application, subject to judicial review under the usual principles.

The suggestions by petitioners, in an effort to endow the substantive questions tendered to this Court with an importance that they do not intrinsically possess, to the effect that review by this Court is now warranted to avoid the ICC's having to consider the fairness of the Plan of Consolidation (A-S Pet. 16; Levin Pet. 15), stand the normal course of administrative and judicial proceedings on its head. The question of the fairness of the proposed Plan of Consolidation is for the ICC in the first instance, not for this Court. The suggestion in the Levin petition (Levin Pet. 19) that the ICC has no jurisdiction over a merger application until the courts have opened their doors to a preliminary skirmish as to the "objectives" of a transaction on its face within the ICC's jurisdiction, would lead to a stultification of the administrative process.[31] The present case has already been pending over two and one-half years in the courts, during which time the ICC proceedings on the application have been at a standstill. If there were to be a full-dress trial in court on the "objectives" of a consolida-

[31] The Levin Petition blithely asserts that the courts should make that sort of determination before the ICC acts: "a sham proposal such as the one at bar [ought] not be allowed to engage the machinery of the ICC and the dignity of the Interstate Commerce Act simply by assuming the formal trappings of 'consolidation'." (Levin Pet. 15) "What we do contend is that, if a consolidation is proposed, it must have the ring of true metal of a consolidation, and form alone cannot supply that ring." (Levin Pet. 17)—Evidently the courts in the first instance, rather than the ICC, have the task of doing the assaying.—The Levin Petition states that the only consolidations which are facilitated by Section 5 of the Interstate Commerce Act are those "that contribute to the national transportation system" (Levin Pet. 20), apparently making the extraordinary suggestion that this sort of determination be made in the first instance by a court.

tion before the ICC were to act, the average hiatus would be longer than two and one-half years.—Needless to say, the cases which petitioners cite on this point all involve judicial review of ICC orders; none of them contemplates a preliminary action in court before the ICC acts.[32]

If the Plan of Consolidation is anywhere near as unfair as the petitioners claim, presumably the ICC will so declare. The ICC is the agency which is empowered by law to pass on the "justice and reasonableness" of an application such as that covering the present Plan of Consolidation, at least in the first instance. The petitioners' assertions of the unfairness of the plan clearly add nothing relevant to the appropriateness of this Court's undertaking to review the narrow and unique questions decided by the Court of Appeals.

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[32] The cases are *County of Marin* v. *United States*, 356 U.S. 412 (1958), and *Wood* v. *United States*, 132 F.Supp. 586 (S.D.N.Y. 1955), both of which were judicial review actions before statutory three-judge courts to set aside ICC orders.

It should also be observed that neither case has anything substantively to do with the present case. In *County of Marin*, this Court held that a merger of a carrier into an inactive corporation which had no assets was not a §5(2) consolidation. Indeed, in substance, the plan there was not to create one carrier where previously there had been two, but two where there previously had been one; the plan was, in essence, a corporate split-up, not a consolidation. 356 U.S., at 418. Here there is obviously a consolidation between two carriers, the MoPac and the Texas & Pacific. The *Wood* case did not involve consolidation or §5(2) at all but rather proceedings under the provisions of §20b of the Interstate Commerce Act for the modification of railroad securities. 49 U.S.C. §20b.

CONCLUSION

For the reasons stated, the petitions for certiorari should be denied.

Respectfully submitted,

MARK M. HENNELLY
210 North 13th Street
St. Louis, Missouri 63103

DENNIS G. LYONS
1229 Nineteenth Street, N.W.
Washington, D. C. 20036

Attorneys for Respondent Missouri Pacific Railroad Company

Of Counsel:

ARNOLD & PORTER
Washington, D. C.

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APPENDIX

APPENDIX

Statutory Provisions

1. Section 5(2), Interstate Commerce Act

Section 5(2) of the Interstate Commerce Act (54 Stat. 905 (1940), as amended, 49 U.S.C. § 5(2)), reads as follows:

* * * * *

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seek-

ing authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable; *Provided,* That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this

part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

* * * * *

2. Sections 351.020 and 351.690(3), Missouri Revised Statutes

Section 351.020, Missouri Revised Statutes, reads as follows:

"Corporations for profit, excepting banking, insurance, railroad corporations, building and loan associations, savings banks and safe deposit companies, credit unions, mortgage loan companies, union stations, trust companies and exposition companies, may be organized under this Chapter [Chapter 351] for any lawful purpose or purposes."

Section 351.690(3), Missouri Revised Statutes, reads as follows:

"The provisions of this chapter [Chapter 351] shall be applicable to existing corporations as follows:

* * * * *

"(3) Only those provisions of this law which supplement the existing laws applicable to railroad corporations, union stations, cooperative companies for profit, credit unions, street railroads, telegraph and telephone companies, booming and rafting companies and exposition companies, and which are not inconsistent with, or in conflict with the purposes of, or are not in derogation or limitation of, such existing laws, shall be applicable to the type of corporations mentioned above in this subdivision (3); and without limiting the generality of the foregoing, those provisions of this chapter which permit the issuance of shares without par value and the amendment of articles of incorporation for such purpose shall be applicable to railroad corporations, union stations, street railroads, telegraph and telephone companies, and booming and rafting companies, and those provisions of this law mentioned in subdivision (1) will apply to all corporations mentioned in this subdivision (3)."

3. Chapter 388, Missouri Revised Statutes

The pertinent provisions of Chapter 388, Missouri Revised Statutes, read as follows:

"INCORPORATION AND ORGANIZATION OF RAILROAD CORPORATIONS

"388.010. 'Railroad corporation' defined

"The term 'railroad corporation' contained in this chapter shall be deemed and taken to mean all corpo-

rations, companies or individuals now owning or operating, or which may hereafter own or operate, any railroad in this state.

"388.020. Chapter to govern

"All existing railroad corporations within this state, and such as may be hereafter chartered or formed, shall, respectively, have and possess all the powers and privileges contained in this chapter; and they shall be subject to all the duties, liabilities and provisions not inconsistent with the provisions of their charter herein contained.

"388.030. Who may form corporation—articles of association—where filed

"1. Any number of persons, not less than five, may form a company for the purpose of constructing, maintaining and operating a railroad for public use in the conveyance of persons and property; and for that purpose may make and sign articles of association, in which shall be stated the name of the company, the number of years the same is to continue, the places from and to which the road is to be constructed or maintained or operated, the length of such road, as near as may be, and the name of each county in the state through or into which it is made or intended to be made, the amount of the capital stock of the company, which shall not be less than ten thousand dollars for every mile of standard or broad gauge, nor less than five thousand dollars for every mile of narrow gauge road constructed or proposed to be constructed, and the number of shares of which said capital stock shall consist, and the names and places of residence of

the directors of the company, not less than five nor more than twenty-one in number, who shall manage its affairs for the first year, and until others are chosen in their places.

"2. Each subscriber to such articles of association shall subscribe thereto his name, place of residence, and the number of shares of stock he agrees to take in said company.

"3. On compliance with the provisions of section 388.040, such articles of association may be filed in the office of the secretary of state, who shall endorse thereon the day they are filed, and record the same in a book to be provided by him for that purpose; and thereupon the persons who have so subscribed such articles of association, and all persons who shall become stockholders in said company, shall be a corporation by the name specified in such articles of the association, and shall possess the powers and privileges granted to corporations, and be subject to the provisions relating thereto contained in this chapter.

"388.040. Articles of association, when filed—incorporation fee

"1. Such articles of association shall not be filed and recorded in the office of the secretary of state, until at least one thousand dollars of stock for every mile of standard or broad gauge railroad, nor until at least five hundred dollars of stock for every mile of narrow gauge railroad proposed to be made, is subscribed thereto and five per cent paid thereon, in good faith and in cash to the directors named in said articles of association; nor until there is endorsed thereon, or annexed thereto an affidavit, made by at least three of

the directors named in said articles, that the amount of stock required by this section has been in good faith subscribed, and five per cent paid in cash thereon, as aforesaid, and that it is intended, in good faith, to construct or maintain and operate the broad, standard or narrow gauge road mentioned in such articles of association; which affidavit shall be recorded with the articles of association, as aforesaid.

"2. Provided, that such articles of association shall not be filed and recorded until such corporation or association shall pay into the state treasury fifty dollars for the first fifty thousand dollars or less of the capital stock of the corporation or association, and a further sum of five dollars for every additional ten thousand dollars of its capital stock, as provided by law."

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"388.220. Amendment of articles of incorporation—method

"1. A railroad corporation may amend its articles of incorporation from time to time in any and as many respects as may be desired; provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of making such amendment, and, if a change in shares or an exchange or reclassification of shares is to be made, such provisions as may be necessary to effect such change, exchange or reclassification as may be desired and as is permitted by this section. In particular, and without limitation upon such general power of amendment, a railroad corporation may amend its articles of incorporation from time to time so as:

"(1) To change its corporate name;

"(2) To change its period of duration;

"(3) To change, enlarge or diminish its corporate purposes;

"(4) To increase or decrease the number of its directors to not more than twenty-one, nor less than three;

"(5) To increase or decrease the aggregate number of shares of any class which the corporation has authority to issue;

"(6) To increase or decrease the par value of the authorized shares of any class having a par value, whether issued or unissued; provided, that if the par value of issued shares is increased there shall be transferred to stated capital at the time of such increase an amount of surplus equal to the aggregate amount by which the par value is increased;

"(7) To exchange, classify, reclassify or cancel all or any part of its shares, whether issued or unissued. The creation, alteration or abolition, in whole or in part, of designation, preferences, privileges or voting powers of any shares previously authorized, or the restrictions or qualifications thereof (including the creation, alteration or abolition of any provisions or rights in respect of the redemption of any shares; or any cumulative or noncumulative dividends, whether or not accrued, which shall not have been declared; or any accumulated but unexpended installment of any sinking fund whether or not set aside for the redemption or purchase of any shares; or any preemption right to subscribe for shares or other securities of the corporation whether existing at law or contained in the articles of incorporation or

other certificate filed pursuant to law), shall be deemed to be a classification or reclassification of such shares for the purpose of this section;

"(8) To change the designation of all or any part of its shares, whether issued or unissued, and to change the preferences, qualifications, limitations, restrictions and special or relative rights including convertible rights in respect of all or any part of its shares, whether issued or unissued;

"(9) To change shares having a par value, whether issued or unissued, into the same or a different number of shares without par value, and to change shares without par value, whether issued or unissued, into the same or different number of shares having a par value;

"(10) To create a new class or classes of stock and to define the preferences, qualifications, limitations, restrictions, and the special or relative rights of the shares of such new class or classes.

"2. Amendments to the articles of incorporation shall be made in the following manner:

"(1) The board of directors shall adopt a resolution setting forth the proposed amendment and directing that it be submitted to a vote at a meeting of shareholders, which may be either an annual or a special meeting;

"(2) Written or printed notice setting forth the proposed amendment or a summary of the changes to be effected thereby shall be given to each shareholder of record entitled to vote at such meeting within the time and in the manner and upon the conditions provided in

section 351.230, RSMo 1949, for the giving of notice of meetings of shareholders;

"(3) At such meeting a vote of the shareholders entitled to vote thereat shall be taken on the proposed amendment. The proposed amendment shall be adopted upon receiving the affirmative vote of a majority of the outstanding shares entitled to vote, provided, however,

"(a) That if any amendment provides for an increase of shares, then such amendment shall be adopted only upon receiving the affirmative vote of persons holding a larger amount in value of the outstanding shares;

"(b) That if any amendment provides for the creation or increase of preferential shares, then such amendment shall be adopted only upon receiving the affirmative vote of a majority of all outstanding shares, including shares not entitled to vote by the articles of incorporation; and

"(c) That if any amendment would alter or change the preferences, priorities, special rights or powers given to any one or more classes of shares by the articles of incorporation so as to affect such class or classes adversely, or if any amendment classifies or reclassifies outstanding shares of any class, or authorizes shares having preferences which are in any respect superior to the preferences of the outstanding shares of any class having preferences, or provides that shares of any class may be converted into shares of any other class or into shares or any other series of the same class, or alters the term or conditions of shares of any class which are either convertible or issuable upon conversion, then the shareholders of each

such class of shares so affected by any such amendment shall vote thereon, whether by the terms of the articles of incorporation such class be entitled to vote or not, and the following vote of each such class of shares so affected by the amendment shall be necessary to the adoption thereof, in addition to the affirmative vote of other shares as in this subdivision (3) required, namely:

"a. In the case of corporations, the articles of incorporation of which do provide for any such change or alteration on a specified vote, the vote of each such class as specified in the articles of incorporation; and

"b. In the case of corporations, the articles of incorporation of which do not provide for any such change or alteration upon a specified vote, the vote of holders of seventy-five per cent of the outstanding shares of each such class."

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"388.290. Companies may consolidate, when

"1. Any two or more railroad companies in this state, existing under either general or special laws, and owning railroads constructed wholly or in part, which, when completed and connected, will form in the whole or in the main one continuous line of railroad, are hereby authorized to consolidate in the whole or in the main, and form one company owning and controlling such continuous line of road, with all the powers, rights, privileges and immunities, and subject to all the obligations and liabilities to the state, or otherwise, which belonged to or rested upon either of the companies making such consolidation. In order to accomplish such consolidation, the companies interested may enter into contract fixing the terms and conditions

thereof, which shall first be ratified and approved by a majority in interest of all the stock held in each company or road proposing to consolidate, at a meeting of the stockholders regularly called for the purpose, or by the approval, in writing, of the persons or parties holding and representing a majority of such stock.

"2. A certified copy of such articles of agreement, with the corporate name to be assumed by the new company, shall be filed with the secretary of state, when the consolidation shall be considered duly consummated, and a certified copy from the office of the secretary of state shall be deemed conclusive evidence thereof.

"3. The board of directors of the several companies may then proceed to carry out such contract according to its provisions, calling in the certificates of stock then outstanding in the several companies or roads, and issuing certificates of stock in the new consolidated company, under such corporate name as may have been adopted; provided, however, that the foregoing provisions of this section shall not be construed to authorize the consolidation of any railroad companies or roads, except when by such consolidation a continuous line of roads is secured, running in the whole or in the main in the same general direction; and provided, it shall not be lawful for said roads to consolidate in the whole or in part, when by so doing it will deprive the public of the benefit of competition between said roads.

"4. And in case any such railroad companies shall consolidate or attempt to consolidate their roads contrary to the provisions of this section, such consolidation shall be void, and any person or party aggrieved, whether stockholder or not, may bring action against

them in the circuit court of any county through which such road may pass, which court shall have jurisdiction in the case and power to restrain by injunction or otherwise.

"5. And in case any railroad in this state shall hereafter intersect any such consolidated road, said road or roads shall have the right to run their freight cars without breaking bulk upon said consolidated road, and such consolidated road shall transact the business of said intersecting or connecting road or roads on fair and reasonable terms.

"6. Before any railroad companies shall consolidate their roads, under the provisions of this section, they shall each file with the secretary of state a resolution accepting the provisions thereof, to be signed by their respective presidents and attested by their respective secretaries, under the seal of their respective companies, which resolution shall have been passed by a majority vote of the stock of each, at a meeting of the stockholders to be called for the purpose of considering the same, sixty days' public notice of the time, place and purpose of such meeting having been given by advertisement in some newspaper printed in the county where the general offices of said company or companies of this state are situated."